New Mitigation Rule Requirements
Individual Permit Applications

General Principles

Savannah District

- **Final rule provides substantial flexibility**
- **Mitigation sequence unchanged:**
  - **Avoidance, minimization, compensation**
  - **404(b)(1) Guidelines provisions concerning avoidance, minimization haven't been changed**
  - **Rule's focus is on compensation for unavoidable impacts**
- **Final rule focuses on the where and how of compensatory mitigation**

Transition to New Rule

- **Final rule applies to permit applications received after the effective date (June 9, 2008)**
- **However, district engineer can make written determination (e.g., memo to file) that a hardship situation exists for a permit applicant**
  - **Applicant committed or expended substantial resources in reliance on previous compensatory mitigation guidance**
  - **Examples: final engineering design work, contractual commitments for construction, purchase or long-term leasing of property**

How does this Rule affect Existing Guidance?

- **The final rule replaces:**
  - **1995 mitigation banking guidance**
  - **2000 in-lieu fee guidance**
  - **Regulatory Guidance Letter 02-02**
  - **Certain provisions of the 1990 Mitigation Memorandum of Agreement between Army and EPA**
    - **Amount, type, and location of compensatory mitigation projects (including the on-site preference)**
    - **Use of preservation**
    - **Other provisions of the 1990 Mitigation MOA remain in effect**

What hasn't changed

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- **Doesn't change when compensatory mitigation is required**
  - **Regulatory's general mitigation policy [33 CFR 320.4(r)] and nationwide permit mitigation [33 CFR 330.1(e)(3)] have not been changed by this rule**
- **Compensation requirements still must be commensurate with the amount and type of impact to be permitted (i.e., the "rough proportionality" test)**
- **Application of the 404(b)(1) Guidelines for avoidance and minimization**

Preference Hierarchy for Compensatory Mitigation

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1. **Mitigation bank credits**
2. **In-lieu fee program credits**
3. **Permittee-responsible mitigation under a watershed approach**
4. **On-site and/or in-kind permittee-responsible mitigation**
5. **Off-site and/or out-of-kind permittee-responsible mitigation**

- Bottom Line: **Consider what is "environmentally preferable" compensation and document your decision**

Watershed Approach

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- **Strategic site selection to improve or maintain watershed functions**
- **Consider likelihood for ecological success and sustainability, location in watershed, and practicability**
- **Use available watershed planning information**
  - **If it is appropriate for compensatory mitigation decision-making**
- **Level of information and analysis commensurate with the scope of permitted activity**
- **May use more than one site to provide compensatory mitigation for a permitted activity**
  - **On-site mitigation measures for water quality and quantity**
  - **Off-site mitigation that provides the desired aquatic resource type (habitat and other functions)**
- **Use of preservation, riparian areas, uplands**

New Requirement for Permit Application Process

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- Mitigation statement required for complete permit application (new §325.1(d)(7))
  - Individual permits only
  - Need to get ENG 4345 re-approved
- For §404 standard permits, public notice must describe proposed avoidance and minimization, as well as any proposed compensation
- Mitigation plan not required, but applicant can submit one voluntarily

Mitigation Statement for IPs

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1. How do you plan to mitigate!!!
2. Mitigation Bank – Which One & How many Credits
3. ILF – Georgia Land Trust – Provide Conversion as found in the NW Regional Conditions (SOP wetland credits x 0.875 = in-lieu-fee wetland acres; and (b) SOP stream credits x 0.0046 = in-lieu-fee stream acres).
4. Other – Watershed Approach, On-site, or Off-site…to include credit generation to offset impacts

Planning and Documentation

- **Individual permits**
  - **Final compensatory mitigation plan must be approved prior to issuance of permit**
  - **If using mitigation bank or in-lieu fee program, permit must identify specific bank or ILF program**

On-site & Off-site Mitigation Plan

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Do You Really Want to go Here??

1. **Objectives - Resource Types, Amount, method of compensation (rehabilitation, establishment, restoration, preservation)**
2. **Site Selection – Must be ecologically suitable**
3. **Site Protection Instrument – Real estate based**
4. **Baseline Data – soil conditions, ecological, historic plant/hydrology**
5. **Determination of Credits – SOP**
6. **Mitigation Work Plan – What exactly you plan to do**
7. **Maintenance Plan – Description & Schedule of maintenance requirements to ensure the continued viability after construction.**
8. **Performance Standards – Ecologically based per objectives**

Is That All? Maybe Not

- **Financial assurances**
  - **When needed to ensure high level of confidence of successful completion**
  - **E.g.. Performance Bond, Escrow Account, etc…**
- **Long-term management**
  - **May be more appropriate for larger compensatory mitigation projects**

Ecological Performance Standards

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- Objective and verifiable
- Based on best available science assessed in a practicable manner
- Use performance standards that can be achieved during the desired monitoring period
  - Focus on early stages of ecosystem development
  - Provides early identification of potential problems`

Monitoring

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- To determine if project is meeting performance standards
- Content of monitoring reports determined by DE
- Length of monitoring period can vary
  - Generally 5 years as minimum
  - Can have longer monitoring periods for aquatic resources with slow development rates (e.g., forested wetlands)
  - Can end monitoring requirement earlier, if performance standards have been achieved (but must have 2 consecutive monitoring reports demonstrating success in meeting performance standards)

Management

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- Site protection
- Should be self-sustaining
- Adaptive Management
  - Measures to address deficiencies/unforeseen events
- Long-term Management
  - Permit or third-party instrument must identify party responsible for long-term management (if required)
  - If long-term management is required, funding arrangements must be described

Special Conditions of an Issued IP

1. **Identify the party responsible for providing the compensatory mitigation**

2. **Incorporate, by reference, the Final Mitigation Plan**

3. **Describe any Financial Assurances or any long Term Management Provisions for the compensatory mitigation project.**

4. **If a Mitigation Bank or In-Lieu Program is used, the condition must state the Bank/Program Name, & the number and**

Questions?

http://www.usace.army.mil/cw/cecwo/reg/